JOHORE REPORTS.

[ORIGINAL CIVIL JURISDICTION].

M. H. WHITLEY, J.

August 7, 1915.

[APPELLATE JURISDICTION].

BUCKNILL, C.J., BRADDELL & EDMONDS, JJ.

February 9, 1916.

WONG AH FOOK.....Plaintiff. (Respondent).

vs.

STATE OF JOHORE.....Defendant. (Appellant).

[JOHORE BAHRU CIVIL SUIT No. 13 of 1915].

[JOHORE BAHRU CIVIL APPEAL No. 5 of 1915].

Contract—gaming rights—concession—construction of—subsequent agreements—restriction of rights—constitutional law of Johore—powers of Sultan—right of action against State—res judicata — duress — estoppel — damages — Civil Procedure Code, S. 392.

In 1892 His Highness the Sultan of Johore granted to the plaintiff for a period of 99 years a concession of rights exercisable within a certain area in Johore Bahru which later came to be known as "Kampong Ah Fook." Such rights included gaming rights and privileges. Since 1879 it was the practice of the Johore Government to farm out rights of maintaining gaming houses within the area over which the farm extended. At the time the concession was granted there had already been in existence the General Farm in which the plaintiff was also interested. As a result of the rivalry between the farms the Government, on 21st July 1908 and latterly on 28th December 1914, ordered that none but the residents in Kampong Ah Fook should be allowed to game in the gaming house established there. To enforce compliance with these orders police posted in and about the gaming-house at Kampong Ah Fook were commanded to prevent non-residents from gaming there. During the period 1908-1914 two agreements of short duration were entered into between the Government and the plaintiff whereby the plaintiff was allowed to receive non-residents to game at his gaming house in Kampong Ah Fook on payment of specified rents. In consequence of the Government interference the plaintiff alleged that his business had come to a standstill involving heavy losses. In an action the plaintiff claimed a declaration that the concession in 1892 conferred upon him the absolute right to permit all persons irrespective of whether or not they were residents to game in Kampong Ah Fook, for the return of all monies paid under the agreements aforementioned which it was said were entered into under duress, and for damages. On behalf of the defence it was urged *inter alia* that the order of the 21st July 1908 was made in pursuance of a judicial decision by His Highness the Sultan and was therefore *res judicata*, that the Court was incompetent to adjudicate upon an order issued by His Highness holding the supreme executive power of the State and that by entering into the agreements the plaintiff was estopped from claiming the declaration prayed for:—

Held, that the conditions which govern the exclusion of jurisdiction on the ground of *res judicata* did not exist in the present case.

Held further, that the Sultan was not above the law and that under the Constitution and by virtue of a Declaration dated 22nd April 1908 later amplified by Section 392 of the Civil Procedure Code the Courts of the State were competent to pronounce upon the legality of the Sultan's executive acts.

Held further, that upon the true construction of the document granting the concession the restriction imposed therein was confined to the locality within which the plaintiff was to carry on business and not to the classes of persons who might do business with the plaintiff.

Held further, that there was nothing from the evidence to justify a finding that the plaintiff entered into the agreements under duress and that, even if he did act under duress, he adopted the agreements after the duress had been removed.

Held also, that the first agreement dated the 27th January 1909 being in its nature a compromise of a disputed claim made *bona fide* for good consideration, the monies paid under it were irrecoverable.

Held further, that the action being founded on the deed of concession and not upon the agreements or any of them, the plaintiff was not by entering into the agreements estopped from asserting his rights under the concession.

TRIAL OF ACTION.

Sir E. C. Ellis and *Roland Braddell* for the plaintiff.

C. I. Carver and *Everitt* for the defendant.

M. H. WHITLEY, J.—The main facts in this case may be summarised as follows:—

By a grant of concession dated the 5th day of September, 1892 His Highness the late Sultan of Johore granted to the plaintiff for a period of 99 years, commencing the 1st February, 1892, certain rights and privileges to be exercised within the limits of a certain area situated at Johore Bahru which had already been alienated to plaintiff under permanent title. This area came to be known as "Kampong Ah Fook." Among the rights and privileges so granted were certain gaming rights. It is in dispute as to the nature of these which has led to the present proceedings. It will be convenient to refer to this grant of the 5th September, 1892 as "the Concession."

From the year 1879 onwards it was the practice of the Johore Government periodically to farm out certain rights, known sometimes as "The Kampong Bandar Johore Farm" sometimes as "The General Farm." These rights varied from time to time, but always included the sole right of maintaining public gaming-houses within the area over which the farm extended. At the time when the concession was given this Farm was held by one Wong Ah Hoon or Wong Ah Wan, and for the due performance of his obligations as Farmer the plaintiff was surety.

During the period of sixteen years immediately following the date of the concession the General Farm was leased on five separate occasions. Plaintiff admits that he was interested in it on some of these occasions, notably when Wong Ah Hoon held it, but denied that he was interested in it on other occasions. At any rate there appears to have been no acute rivalry between plaintiff and the General Farmer until Wi Keh Poh became Farmer. He secured the General Farm for a period of three years commencing the 16th January, 1907.

In a letter dated the 21st July, 1908 Wi Keh Poh complained to the State Secretary of what he considered to be the unfair competition of plaintiff's gaming-house at Kampong Ah Fook.

This complaint was communicated to His Highness the Sultan and on his instructions the State Secretary, upon the same day, addressed a letter to plaintiff informing him that from that date the Government would not allow any persons, other than the Chinese residing in Kampong Ah Fook, to game in the gaming-house established there. At the same time steps were taken to enforce obedience by posting Police in and about the gaming house with orders to prevent non-residents from gaming.

According to plaintiff this order, coupled with the activity of the Police, brought his gaming business to a standstill. He made various representations to the Government without definite result, until finally his manager, Wong Ah Yam received a letter from the State Secretary, dated the 28th December, 1908, stating that His Highness had ordered that gaming by non-residents would not be permitted, unless plaintiff paid rent to the Government like the General Gaming Farm.

In the meantime similar action had been taken by the Government in respect of a gaming-house belonging to one Lim Ah Siang who had received a grant of certain rights over another area in the neighbourhood. There were, however, important differences between the case of this man and that of plaintiff, which it is not necessary to examine in this context.

Early in 1909 Lim Ah Siang exerted himself to effect a compromise with the Government. In consequence of his efforts a meeting took place at the Johore Hotel on the 13th January between His Highness the Sultan, Wong Ah Yam, Lim Ah Siang and others, and an arrangement was come to, the terms of which were embodied in a rough memorandum. This document, so far as plaintiff was concerned was expanded into a formal agreement, executed on the 27th January, whereby, for a period expiring on the 31st December, 1909, plaintiff was to be permitted to receive non-residents to game at Kampong Ah Fook on payment to the Government of the sum of $1,000 per mensem. Upon the execution of this agreement the Police were removed from the gaming-house and non-residnts were again admitted to game.

Subsequently Wi Keh Poh failed to carry out his obligations under the General Farm contract and the Government accordingly transferred that Farm to Wong Ah Yam for the period commencing the 16th May, 1909 and ending the 15th January, 1910, that is to say, for the unexpired portion of Wi Keh Poh's term.

Towards the end of 1909, then, the position was this. The agreement of the 27th January, would terminate on December 31st, and on the 15th January following the General Farm contract would expire. In view of this plaintiff addressed a letter, dated the 29th November, to the State Secretary, reciting the services he had rendered and making application for the General Farm and for the gaming rights over Kampong Ah Siang and Kampong Ah Fook for the year 1910, at monthly rents of $4,000, and $1,000 respectively. At a meeting of the State Council held on the 2nd December, 1909 this application was approved, and on the 15th February, so far as Kampong Ah Fook was concerned, plaintiff entered into an agreement similar in all respects to that of the 27th January, 1909, except that the period of the agreement was to be two years instead of one. At the same time the General Farm was granted to plaintiff for a term of two years, expiring on the 15th January, 1912. For these two years, then, all the gaming rights in and about Johore Bahru were entered in plaintiff's hands.

Towards the expiration of that term plaintiff received a letter from the State Secretary, dated the 23rd November, 1911, stating that the Government did not propose to extend the agreement of the 15th February 1910. However, the possibility of further conflict at this stage between plaintiff and Government as to the rights of the Farmer was obviated by the leasing of these rights to the new General Farmer, Loke Chow Kit, for the period of the General Farm, which was to expire on the 31st December, 1914.

Towards the end of 1914 Loke Chow Kit obtained the General Farm for a further term but failed to come to any agreement with plaintiff as to his rights in Kampong Ah Fook. It was in consequence of this apparently that on the 28th December, 1914 a notification was issued by Government that all persons were strictly prohibited from coming, entering and gambling in Kampong Ah Fook, excepting only those residing within the area of and in that Kampong." From the 1st January, 1915 Police Officers have again been stationed in and about the gaming-house in that Kampong in order to secure compliance with the notification, and plaintiff represents that once again his gaming business has been brought to a standstill.

Plaintiff prays judgment:—

(a) For a declaration that the concession conferred upon him the right to permit gaming in Kampong Ah Fook by any one and not only by those residing within the Kampong:

(b) For a return of all monies paid in accordance with the said agreements of the 27th January, 1909 and the 15th February, 1910, on the ground that he entered into the said agreements under duress; and

(c) Damages, alleged to have been sustained by reason of defendant's action in preventing non-residents of the Kampong from gaming during a portion of the years 1908 and 1909, and during the current year.

Defendants reply upon the following pleas:—

(a) That the order conveyed to plaintiff in the letter of the 21st July, 1908 was

an order in pursuance of a decision of His Highness the Sultan, who held at that time "the supreme judicial power of the State," that the concession conferred on plaintiff no right to permit gaming in Kampong Ah Fook by persons not resident in that Kampong, and that this Court has no power to question such decisions.

(b) That at the time of the said order His Highness held "the supreme executive power of the State," that such order was issued at his command and cannot now be questioned by this Court;

(c) That under the true construction of the concession the right to game in Kampong Ah Fook was and is confined to persons residing in the said Kampong;

(d) That the agreements of the 27th January, 1909 and of the 15th February, 1910 were entered into by the plaintiff voluntarily and not under any duress, as is alleged by plaintiff; and, lastly

(e) That by entering into the said agreements plaintiff is estopped from claiming the declaration for which he asks.

The first two of these pleas, namely, those which question the jurisdiction of this Court, are based on the same set of facts. These facts, so far as on the evidence goes were simply these. The General Farmer made a complaint by letter, dated the 21st July, 1908, and on the same day His Highness the Sultan issued an order to plaintiff restricting gaming in Kampong Ah Fook.

The first plea, therefore, resolves itself into this, at some time on that particular day His Highness, in the capacity of the supreme judicial authority of the State, gave a decision which finally determined plaintiff's rights under the concession. The decision is represented to be a judicial decision, and the matter with which it deals, that is to say, the construction of the concession, is said to be *res judicata*.

Now, the conditions which govern the exclusion of jurisdiction on the ground of *res judicata* are set out in section 7 of the Civil Procedure Code, which is as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue

"Has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and

"Has been heard and finally decided by such Court." I prefer to take this statement of the law rather than that set out in *Langmead* v. *Maple* (18 C.B.N.S. page 255) cited by plaintiff, because it is the law of the State.

Now, it is clear that the matter at present in issue between the parties was never "in issue in a former suit between the same parties," because there never was a former suit between them. And it is equally clear that no such matter in issue was ever "Heard." Indeed, according to the evidence of the plaintiff—and upon this point it is not questioned—the order took him entirely by surprise, for until it was communicated to him, he had no knowledge that any one connected with the Government disputed his right to admit non-residents into his Kampong to game.

The doctrine of *res judicata* is necessary in order that there may be an origin of litigation; in the present case there is nothing to show that there was ever a beginning.

The defendants admit that the conditions ordinarily necessary to a plea of *res judicata* were not present in this instance, but contend that such conditions are only applicable where there is a Court to which can resort, and that of course His Highness could not appear in his own Courts.

The answer to that, in my opinion, is that this is the defendants' plea and if they cannot establish the conditions necessary to their plea, the plea must go. But apart from that, I am by no means satisfied that the matter might not have been taken into the regular Courts of the State. The active party was the Government, and had the Government desired to obtain a judicial decision in the normal manner, I do not think any insuperable obstacle would have prevented itself.

Not only does the evidence disclose no proceeding of a judicial character, however broadly the term 'judicial' be interpreted, but it furnishes substantial grounds for doubting whether any final decision, judicial or otherwise, had been arrived at when the order in question was given. Thus, at the State Council Meeting of the 29th July, 1908 His Hinghness states, "Ah Fook's document is not clear." His Highness would hardly have used those words if within the past few days he had adjudicated finally upon it. Again, at a further meeting held on the 5th August, 1908, His Highness said, "as to the Meeting on the matter of Kampong Ah Fook, this will be postponed from to-morrow and it will be brought on another day. Do not be hasty, consider it properly beforehand." At the same Meeting Mr. Buckley, the General and Financial Adviser to the Johore Government, said "I do not think it wise if we fight with Ah Fook regarding his Kampong."

These minutes establish that no final decision of any sort had been come to at the time

they were written, and that no one then—certainly not His Highness or Mr. Buckley — considered that a judicial ruling, determining the interpretation of the concession, has been given. Indeed, the words "Do not be hasty, consider it properly beforehand,' indicate that His Highness looked to the Council for a decision.

The facts proved amount, in my view, to no more than this. His Highness formed an opinion and gave effect to it by an executive order. He never purported to act in a judicial capacity at all. For these reasons I find that the order communicated to plaintiff in the letter of the 21st July, 1908 did not issue in pursuance of a judicial decision such as would exclude the jurisdiction of this Court.

The second plea is intended to be complementary to the first and was so treated by both parties. It may be stated in this way; His Highness gave an order which finally determined plaintiff's rights; if it was not given in a judicial capacity, it was given in an executive capacity, and, in either case, His Highness was the Supreme Authority in the State, and was not, and is not, subject to the law.

In so far as this asserts that His Highness cannot be made answerable in a personal sense, there is no dispute. But it goes much further than that. Defendants contend that the State cannot now be made liable for the acts of the supreme executive authority committed in July, 1908, because the supreme executive authority was then above the law. In other words, the position of His Highness in the constitution of the State has been put in issue.

The arguments put forward in support of the plea were, first that the State is governed by the Mohammedan Law and under that Law the Sovereign's power is absolute; and secondly, that by the constitution of Johore no restriction is placed upon the Sultan's authority.

Now in the first place it is not true, as a general statement, that the State is governed by the Mohammedan Law. It is governed by the laws of the country, and they, in some respects are even antagonistic to the Mohammedan Law.

The Constitution of 1895, to which further reference will be made later, enacts in clause LVIII: "*All the laws and customs of the country* shall be carried out and exercised with justice and fairness by all the Courts of Justice and by all Officers and servants of the State." There is no mention of the Mohammedan Law there.

But it is unnecessary to labour this point, because no authority was produced by defendants to show what is the legal position of the Sovereign in a Mohammedan State. On the other hand the following passage was cited by plaintiff from *Hamilton's* Hedaya Volume II; page 34:—

> "If a Supreme ruler (such as Khalif for the time being) commit any offence punishable by law, such as whoredom, theft or drunkenness, he is not subject to any punishment, but yet if he commits murder he is subject to the law of retaliation, and he is also accountable in matters of property —because punishment is the right of God, the infliction of which is committed to the Khalif (or other supreme Magistrate) and to none else; and he cannot inflict punishment upon himself, as in this there is no advantage, because the good proposed in punishment is that it may operate as a warning to deter mankind from sin, and this is not obtained by a person's inflicting punishment upon himself; contrary to the rights of the individual, such as the laws of retaliation and of property, the penalties of which may be exacted of the Khalif, as the claimant of right may obtain satisfaction either by the Khalif empowering him to exact his right from himself, or by the claimant appealing for assistance to the collective body of the mussulmans."

This passage, if it is on an accurate representation of the principle with which it deals, shows that according to Muhammadan Law the the Sovereign's power is by no means absolute, indeed it proves that in matters of property the Sovereign is under the Law. But were the authority of other text book writers produced to prove the contrary, I would regard it as affording little or no assistance to the Court, because here we have to deal with the actual circumstances of Johore and not with any Muhammadan theory of Government.

The second argument advanced by the defendants is based on the written Constitution of the 14th April, 1895. This is a document of sixty four clauses subscribed by the late Sultan, Abubakar, and the Members of the Council of State. It is termed "The Law of the Constitution of the State of Johore" and has been printed both in Malay and English and published. Defendants contend that the position of the Sultan in the Constitution is to be sought in this document and that in point of fact no restriction is placed upon His Highness' authority. With the second of these propositions I am inclined to agree. Certain apparent checks, such as are contained in clause XXV providing that the Sultan's allowance shall be fixed by the Council of State, and in clause XLII, setting out that it is expedient and necessary for the Sovereign to take the advice of the Council of Ministers, are rendered of little practical value of the provisions which reserve to the Sultan the unrestricted right of appointing and dismissing his ministers (clauses XXXIV and XL).

But whatever the exact significance of the Constitution of 1895 may be, it is certain that very considerable restrictions were placed upon the Sultan's authority by a document "passed and signed by the Sultan and all the Council" on Wednesday the 22nd April, 1908. It will be convenient to refer to this document as "the Decla-

ration." The declaration was produced by defendants late in the proceedings—in fact after their case had been closed, and therefore I have not had the advantage of hearing any argument from them upon it. It recites that "no person can be deprived of his liberty, detained or imprisoned except in due course of law, not even by the Sultan himself." It lays down that "no instructions regarding any particular matter which is before any Court can be given to Judges or Magistrates by the Sultan or by any of his Ministers." It provides that persons imprisoned otherwise than in due course of law may appeal to the Court. But the portion of the Declaration most relevant to the matters in issue is as follows:—

> "The Sultan shall act towards all his subjects in an honourable and impartial manner, showing kindness and consideration to all, governing according to law, for he is not truly a ruler whose will and pleasure rule and not the law, and maintaining the existing religion and the rights and liberties of the people, remembering that he has been placed on his high position by the people in the belief that he would justify their confidence in him."

This Declaration is not a mere promise, it is a solemn declaration of the law. It is as much a part of the constitution of Johore as the Constitution of 1895, which it resembles in that it is the joint act of the Sultan and of his Council of State.

The most important part of it, for the purpose of the present proceedings, is that which enacts that the Sultan shall govern "according to law." The meaning of that expression is, the Sultan shall be under the law, and therefore that the legal tribunals of the State shall have jurisdiction to decide upon any doubtful exercise of the Crown's prerogative. The same expression is included in the British Coronation Oath, in order to secure precisely that check upon the improper exercise of the prerogative. The signatories to the Declaration intended to leave no doubt as to their meaning for the words quoted are followed by "for he is not truly a ruler whose will and pleasure rule and not the law." It is evident then that since the 22nd April, 1908 the Sultan has been under the law, and there has been jurisdiction in the Courts of the State to pronounce upon the legality of any of his executive acts. Accordingly I hold that defendants' second plea fails.

But the matter does not rest there. Since the 1st January, 1915 the Civil Procedure Code of the Federated Malay States has been law in Johore. Section 392 of the Code is as follows:—

"Any claim against the Ruler or Government of the State founded on the use or occupation or right to use or occupation of State lands, and any claim arising out of the revenue laws, or out of any contract which has been, or may be, or should have been, entered into, on behalf of the Ruler of the State by or by the authority of the Government of the State, which would if such claim has arisen between subject and subject, be the ground of a suit under this Code, and any claim against the Ruler or Government of the State for damages or compensation arising in the State and any other claim which might lawfully be enforced as between subject and subject, shall be a claim which, subject to the provisions of this chapter, may be enforced by suit against the State under this Code."

This section is a natural corollary to the Declaration of the 22nd April, 1908. It does not render anything illegal which was formerly legal. It does not impose any new restriction upon the Crown's prerogative. It merely enumerates the classes of claims that may be brought against the State and, together with the context, provides a procedure to regulate suits founded upon them. This section is an amplification of the Declaration and unquestionably secures to plaintiff the right of enforcing a claim of the present character by suit against the State.

Passing now to the merits, the first question to be considered is the construction of the Concession of the 5th September, 1892. In the course of argument each party referred to extrinsic circumstances in support of his interpretation of the Concession and, in so doing, relied upon the authority of *Attorney General* v. *Drummond* (1 Drury and Warren page 368). That case lays down a rule of law for the construction of ambiguities in ancient instruments. The instrument in this case is not an ancient instrument, and in my opinion, it contains no ambiguity in the sense in which that word is used in the authority cited. I think, therefore, that the construction of it must be determined upon intrinsic evidence only.

Now, the words of the Concession which immediately apply to gaming are "Firstly he may permit people to gamble," or, in the Malay original, "pertama—buleh is membenar kan orang Berjudi." Taken by themselves these words obviously in no way restrict the persons who may game to those falling into any particular class or classes. But defendants contend that the words just preceding those quoted limit the right of gaming to the persons residing on plaintiff's land. The words in question are "grant to Wong Ah Fook.....the rights as follows only within the boundaries and on the lands which have been granted to him....." The Malay version is "Mengornia kan kepada Wong Ah Fook .....hak kebenaran.....sperti debawah ini didalam per hingga-an dan atas tanah di kerniakan kapada nya itu sehja.'

Both in the English translation and in the Malay original there is some doubt as to the precise grammatical value of the word 'only' (itu sehaja). But whether the word be read as limiting the rights to those set out below or to the area over which those rights were to be exercised,

or as applicable to both the rights and the area, it plainly, to any mind, does not introduce the qualification for which defendants contend.

They argue that the only reason for mentioning the boundaries and the land was to preclude non-residents from gaming. But in all the documents produced in this case which purport to confer gaming rights an area within which the exercise of those rights is to be confined is invariably set out, and since the commencement of The Revenue Farms Enactment, 1911, farms constituted thereunder have always been upon a territorial basis. It is difficult, indeed, to imagine any satisfactory alternative. The General Farm Contract of 1892, dated a few months prior to the Concession, contains a description of the area over which the Farmer's rights were to extend. It is to be said then that no person from Singapore was to be permitted to game at the General Farm? Such a restriction would have had an unfavourable effect upon the Farmer's profits and therefore upon the public revenue without any compensating advantage to the State. The truth of course is that public gaming was, and is, a Government monopoly which it has been the practice to farm out not as a whole, but in portions. Farms may be for shorter or longer periods, but the essential distinguishing feature between one farm and another is the area to which it is limited. Within such area, unless specially otherwise provided, a farmer has the right to establish as many gaming-houses as he may think fit.

For these reasons I hold that the object of prescribing an area in the Concession was not to place a restriction upon the classes of persons who might do business with plaintiff, but upon the locality in which the business was to be done.

In the second place defendants urge that the words "he may permit people to gamble" differ from the operative part of the General Farm Contract of the 25th July, 1892 and therefore the nature of the rights granted are to be distinguished. The words in that Contract are "..... telah memajak-kan.....chukai atas segala rupa judi yang biasa dalam Bandar Johore Bahru ini.....lain dari pada lotry yang bernama Wi Seh," which may be translated "have farmed the tax upon all kinds of gaming customary in this town of Johore Bahru, other than the lottery known by the name of Wi Seh."

There is no doubt that this is a different form from that used in the Concession, and I am inclined to agree that the transactions which the concession and the Contract evidence were regarded as different in character. For years prior to the Concession the rent paid by gaming farmers had constituted an important item of State Revenue. The profits derived from gaming were regarded as a form of taxation. In the Contract, therefore, the word 'chukai' is used. That word is rendered in the dictionary of Mr. R. J. Wilkinson as "Toll: tax; impost; dues of all sorts levied by Government." On the other hand, the Concession is a grant for 99 years at a nominal rent of $120 per annum. It was plainly not regarded as an alienation of the right to collect revenue, but as a grant of privileges; it was accordingly expressed differently, and the word 'chukai' does not occur in it. Differences in the language of these two documents are referable, in my opinion, to the difference in the general nature of the transactions which they evidence, not to any difference in the specific rights which they confer.

In the third place, defendants submitted that the concession purported to bestow upon plaintiff no wider rights than were enjoyed by Kangchus. In the course of argument it was admitted that there is no legal restriction upon the classes of persons who may game in places under the jurisdiction of Kangchus. This argument therefore seems to be against defendants rather than in their favour.

The conclusion to which I have come is that, so far as the Concession is concerned, plaintiff is at liberty to permit any and all persons to game within the area over which it extends.

The next issue to be considered is whether the Agreements of the 27th January 1909 and the 15th February 1910 were entered into by plaintiff voluntarily or under any duress.

The plea of duress has become obsolete in England and no cases have been cited in these proceedings in which such a plea was successful. In *Leake* on Contract (5th edition—page 279) the following statement of the law appears:—

> "The duress recognised in law, as producing a sufficient degree of fear to vitiate an Agreement, may consist in actual violence to the person or in threats thereof."

To this is appended a quotation from the judgment of Lord Denman, C.J. (*per Curiam* in *Skent* v. *Beale*, 11 Ad. & Ellis page 990):—

> "An agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal: and, with regard to the former, the law is laid down and the distinction pointed out between duress of, or menace to, the person and duress of goods. The former is a restraining force, which not only takes away the free agent but may leave no room for appeal to the law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

In the present case there is no question of any actual violence or threats thereof having been offered to the person of plaintiff. It was urged that violence was threatened by the Police to his licensees, that is to say, to the non-residents of the Kampong who went there to game. But plaintiff never suggested that it was to save them

from violence that he entered into the agreements, and even if it had been so, his interest in them was too remote to support a plea of duress.

The reasoning adopted by plaintiff, as I understood it, was this: duress to the person vitiates an agreement because it prevents recourse being had to the law; plaintiff could not have recourse to the law, therefore he entered into the agreements under duress to the person. Plaintiff further explained that the reason why he could not have recourse to the law was because the Civil Procedure Code did not come into force until the 1st January 1915.

I have already found that since the 22nd April 1908 the Courts of the State had jurisdiction to entertain such a claim as plaintiff's: and that finding disposes of this argument. But, were it otherwise, it must be remembered that plaintiff never in fact tried to institute a suit and accordingly is not in the position of a man who can say that the law was powerless to help him. Consequently even if this doctrine of what may be termed "constructive duress" were established, I do not think that plaintiff's case could be brought within it.

But assuming that plaintiff did act under duress, what is his position now? On the authority of *Ormes* v. *Beadel*, Eng. Rep. 45 Ch. page 649 the following statement is made in *Leake* on Contract (5th edition p.279):—

> "An agreement included by duress like an agreement induced by fraud, is not absolutely void, but voidable only at the election of the party intimidated. If the latter after the duress is removed voluntarily acts upon the agreement, he thereby confirms it and precludes himself from afterwards avoiding it."

It is contended that the duress in this case was never removed. But it is certain that the Police were removed, and I find myself unable to believe that by reason of the alleged imperfect legal facilities of the State plaintiff lived in an atmosphere of intimidation throughout the thirty-five months over which the agreements extended. If plaintiff did enter into the agreements or either of them under duress, I am of opinion that he voluntarily acted upon them after the duress was removed and cannot now avoid them.

Plaintiff further claimed that, apart from his common law rights, he is entitled to equitable relief on the ground that where a party is not able to protect himself the Court will protect him. He read a short passage from the text book enunciating this proposition, but did not support it with any authority to prove that the circumstances of the present case were such as would justify a Court of equity in setting aside the agreements in question. I consider his argument on this point to be incomplete. But even were it established that the circumstances preceding the making of the agreements were sufficient in themselves to warrant equitable interference, I think plaintiff would forfeit his remedy by reason of his subsequent acquiescence.

Reference was also made by plaintiff to the doctrine of "Ikrah" or compulsion which is discussed at page 47 of *Syed Ameer Ali's* work on the Muhammadan Law. The object of this reference, as it seemed to me, was to prove that a Sultan is as much a subject to the doctrine of Ikrah as other persons, and not to prove that the Muhammadan Law would afford any special protection to plaintiff. I have already dealt with the liability of the State in respect of executive acts and need notice this passage no further.

In addition, however, to his plea that the agreements should be entirely avoided on the ground of duress, plaintiff claims that the monies paid to the Government under them were paid under compulsion and ought to be refunded. He alleges that His Highness took away his rights and refused to restore them unless he paid a large sum of money for them. He relies upon *Shaw* v. *Woodcock*, 7 Barnewall and Cresswell page 84 in which Bayley, J. laid down this principle:—

> "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter in order to obtain possession of his property pays that sum, the money so paid is a payment made by compulsion and may be recovered back."

In that case the plaintiff was entitled to certain policies of insurance upon which defendants claimed a lien for a certain sum. Plaintiff paid the sum in order to obtain possession of the policies and then recovered the sum so paid.

In further support of the principle the case of *Smith* v. *Cuff* (6 Maule & Selwyn) was cited. There Lord Ellenborough, at page 165 asserts that "money obtained by extortion and oppression may be recovered back."

The facts leading up to the making of the agreement of the 27th January 1909 show that His Highness's action in the first place was prompted by a desire to protect the General Farmer, that he re-iterated his view of the proper construction of the Concession at various Meetings of the Council, that he urged the Council to consider the matter properly and that no final reply was given to plaintiff's representatives until five months had passed. Now, if His Highness were acting otherwise than in good faith, it is difficult to understand why so much consideration was given to the matter after the 21st July 1908. There would surely have been an immediate decision and a refusal to consider it. Further, if the object were merely to extort money from plaintiff, is it not probable that more pressure would have been applied in order to hasten his submission, instead of permitting some six months to pass with the matter still unsettled? Again, at the meeting which took place at the Hotel, when terms were

ultimately arranged, there was undoubtedly bargaining. If this were a case of compulsion would not a definite demand have been made and enforced? And, in the Agreement of the 27th January, to which I shall refer more fully later, would not His Higness's interpretation of the Concession have been set out in clear and emphatic language? These considerations have convinced me that His Highness's interpretation was *bona fide*, if mistaken.

On the other hand, plaintiff, a man with many other interests in the State, although no doubt very dissatisfied with the course affairs had taken, contents himself with addressing protests to the Government and with asking Mr. Buckley to intervene. Subsequently he professes himself ready to treat with the Government and the parties agree to adjust their differences temporarily. They enter into an arrangement which is to remain in force until the end of the year. The Agreement of the 27th January was, in my view, a temporary compromise of a disputed claim and comes within the rule stated in the head-note to *Ockfold* v. *Barelli*, 25 Law Times page 504:

> "The compromise of a disputed claim, made *bona fide*, is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded."

The decision in that case was expressed to follow that in *Callisher* v. *Bischoffsheim*, L.R. 5 Q.B. page 449. There the plaintiff alleged that certain monies were due to him from the Government of Honduras, and that he was about to take proceedings to enforce payment, and thereupon in consideration that plaintiff would forebear taking such proceedings for an agreed time, the defendant promised to deliver certain debentures. Giving judgment Cockburn, C.J., said:—

> "No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue, but this does not vitiate the contract and destroy the validity of what is alleged as the consideration..... Everyday a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes that he has a fair chance of success he has a reasonable ground for suing, and his forebearance to sue will constitute a good consideration."

I have already found that the view taken by His Highness as to plaintiff's rights was *bona fide*. The Agreement of the 27th January 1909 must therefore be regarded as a compromise for good consideration. The monies paid under it by plaintiff cannot be recovered.

The second agreement, that of the 15th February 1910 was in fact simply an extension of the first agreement, and does not require separate consideration. For the reasons already given the monies paid under it likewise cannot be recovered.

The fifth and last plea of defendants is that plaintiff by entering into the said agreements is estopped from claiming the declaration asked for by him.

The important words in the agreements, as translated are these:—

> "Now whereas it is stated in the Document of Authority referred to (i.e. the Concession), but it was not made certain that he can receive people from outside his area to come in and gamble within his gaming place which is within his area therefore we now give this letter of authority in addition in that matter."

In the course of argument defendants state the plea thus: At the end of 1908 His Highness the Sultan took certain views and submitted them to plaintiff who accepted them, and plaintiff cannot now say that the rights are other than were then admitted. At a later stage it was put thus: the estoppel lies in leading (sic.) the Sultan to accept the position that his contention was right.

In the first place, those Agreements were prepared by defendants and drawn in the form of a Grant. They commence with the words: "Now, we Ibrahim, Sultan and Yang Di pertuan of the State and Territory of Johore grant this document of authority....." and they go on to refer to plaintiff in the third person. The recital quoted above, therefore, is in form the statement of His Highness alone and it is at least open to question whether plaintiff can be held to have participated in it. In *Everest and Strode's* work on the Law of Estoppel (Second Edition page 251) is written: "A recital of a particular fact only estops both parties to an Indenture where it is intended to be the Agreement of both parties to admit such fact; and it is a question of construction whether the recital was so intended."

I think it questionable whether this recital, whatever its significance, could estop the plaintiff, but I prefer to decide the plea upon other grounds.

What then is the significance of the recital? The particular words are, "it was not made certain that he can receive people from outside." That is to say, it was left doubtful whether he may receive people from outside or not, I can see no admission of rights in this to which plaintiff must now be held, nor any representation by the plaintiff that he accepted His Highness's interpretation of the Concession. If this is the statement of both parties then both parties say that the meaning of the Concession is doubtful, and neither of them abandons his own convictions. There is nothing in this to prevent either party coming to the Court to have the doubt resolved. If there is any room for an estoppel here, surely it would operate to prevent defendants from setting up a plea that the constructions of the Concession had already been finally determined.

Assuming, however, that the recital in question would be sufficient to estop plaintiff in an action upon the Agreements, it must be remembered that this is an action upon the Concession and there can be no estoppel arising out of a deed where the action is not founded on the deed, but is wholly collateral to it. The authority for this proposition is *Re Ghost's Trusts* (1883) 49 L.T. 588. That was a case in which pecuniary legatees who had not received legacies in full executed a release to the trustees acknowledging receipt of legacies, it was held that they were not estopped from claiming the balance on the subsequent falling in of other funds.

That was a stronger case than this because the release apparently concluded the matter once for all, whereas here the recital by recording a doubt manifestly leaves it open.

It is evident that the agreements were intended to be nothing more than purely temporary arrangements, and the recitals in them seem to me to have been expressed with deliberate vagueness in order that neither party should appear to have abandoned his own construction of the Concession.

Upon these grounds I hold that the plea of estoppel fail.

To summarise my conclusions, I find that plaintiff is entitled to the declaration for which he asks, and to such damages as he may prove to have sustained by the action of the Government in preventing non-residents of Kampong Ah Fook gaming there during the current year. He is not entitled to the return of monies paid by him to Government under the Agreements of the 27th January 1909 and the 15th February 1910, nor to any damages in respect of any period prior to the making of these Agreements, for the reason that the Agreements were a voluntary compromise.

Defendants to pay plaintiff's costs.

Question of damages reserved for further consideration if necessary.

Judgment accordingly.

Solicitors for the plaintiff—*Drew & Napier and Rodyk & Davidson.*

Solicitors for the defendant—*Donaldson & Burkinshaw.*

[The defendant appealed to the Court of Appeal. The appeal was heard before Bucknill, C.J., Braddell and Edmonds, JJ. on the 7th, 8th and 9th February, 1916 and was dismissed without the respondent being called upon.]

[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
January 28, 1937.
[APPELLATE CIVIL JURISDICTION]
HOWES, Ag. C.J. (S.S.).
HORNE, J. & LAVILLE, Ag. J.
May , 1937.

PUAN YING (m.w.).....Appellant (Chargor)

vs.

S. M. S. SINNIAH CHETTIAR.....Respondent (Chargee).

[JOHORE BAHRU CHARGEE'S APPLICATION No. 24 of 1937].

[J. B. CIVIL APPEAL No. 1 of 1937].

LEE THON POO.....Appellant (Chargor)

vs.

S. R. M. S. CHETHAMBARAM CHETTIAR .....Respondent (Chargee).

[JOHORE BAHRU CHARGEE'S APPLICATION No. 25 of 1936].

[JOHORE BAHRU CIVIL APPEAL No. 2 of 1937].

Usurious Loans Enactment, Section 3 — charge—previous dealings—re-opening transaction—excessive interest.

P. Y. charged in favour of S. M. S. S. C. her undivided half share of the land comprised in Johore Government Grant No. 8209 for $3,600/- under charge "E" dated the 9th May 1929 and for $2,750/- under another Charge "N" dated the 12th April 1931. L. T. P., P.Y's husband and attorney, charged in favour of S. R. M. S. C. C. his land comprised in Grant No. 11871 to secure the repayment of $4,000/- by a Charge "R" dated the 9th August 1934. It was clear from the evidence that the charges in reality formed part of a series of transactions between P.Y. and her husband (hereinafter referred to as "the Chargors") on the one hand and S. M. S. S. C. and S. R. M. S. C. C. (hereinafter referred to as "the chargees") on the other hand. The Chargors having made default in payment, the chargees made two separate applications to have the lands, the subject-matter of the charges, sold in satisfaction of the debt. By order of Court dated the 24th January 1937 these applications were consolidated. The chargors contended that charge "R" was voidable under the Contract Enactment because it had been procured by undue influence and that the transaction was usurious within the meaning of the Usurious Loans Enactment.

Mills, J. before whom the applications were heard, held (1) that the contract was not induced by undue influence and therefore was not voidable under the Contract Enactment and (2) that the transaction sought to be re-opened was the contract on which the proceeding was brought, that is, Charge "R", and that that transaction was the only transaction with regard to which the Court was permitted to consider whether the interest charged was excessive and whether the transaction was substantially unfair. He held that the rate of interest 20 per cent was not unreasonable and refused relief under the Usurious Loans Enactment. The learned Judge accordingly made orders for sale of the lands by public auction.

Held, by the Court of Appeal, reversing the decision of Mills, J., that as Charge "R" was given as the result of an agreement to close previous dealings between the Chargors and the Chargees and to create a new obligation, the Court had power under Section 3 (1) of the Usurious Loans Enactment to re-open the transaction.